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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 603

DONALD J. MacFARLANE,

Petitioner,

vs.

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
A CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE SMITHROP-WARREN PRINTING COMPANY, CHICAGO

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

MAY IT PLEASE THE COURT:

Your petitioner, Donald J. MacFarlane, respectfully prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the 7th Circuit, entered on the 9th day of November, 1951, affirming the judgment of the District Court for the Western District of Wisconsin, which judgment was dated February 6, 1951, appellant's motion for rehearing being denied November 28, 1951, denying recovery to petitioner on his health and accident policy issued by the defendant, Pacific Mutual Life Insurance Company.

SUMMARY AND STATEMENT OF MATTERS INVOLVED.

Action commenced on or about the 14th day of December, 1948 by plaintiff and appellant, Donald J. MacFarlane, to recover damages for breach and repudiation by defendant, Pacific Mutual Life Insurance Company, of a certain health and accident policy issued by the defendant to the plaintiff.

Plaintiff and petitioner was stricken with polio on or about the 14th day of September, 1946, while said policy was in full force and effect. Defendant paid monthly indemnity under said policy at the rate of $200.00 per month, to on or about the 22nd day of July, 1947, when it refused to make further payments under said policy and advised Petitioner that it considered May 8, 1947 as the cut off date for liability under said policy for house confinement benefits and advised plaintiff that he was no longer house confined within the meaning of the policy, after he had been wheeled out onto his porch in his wheel chair. Further payments were refused under said policy after said date.

The clause involved in said policy is as follows (Tr. 3, 61-62):

> "Pacific Mutual Life Insurance Company hereby insures Donald J. MacFarlane against loss, as hereinafter specified, caused by sickness contracted after fourteen days from the date of this Policy and during the term of this Policy (herein called such sickness); and against loss as hereinafter specified, resulting directly and independently of all other causes * * *; subject to the provisions, conditions and limitations contained in this Policy, as follows:
>
> "'The Sickness Monthly Indemnity is Two Hundred Dollars.
>
> * * *'

"This Policy is issued in consideration of the payment of the premium of One Hundred Twenty-eight & 25/100 Dollars. * * *

"Part I. SICKNESS BENEFITS.

"House Confinement.

"Lifetime Income.

"(a)—The Sickness Monthly Indemnity—will be paid for the period which commences while this Policy is in force, throughout which the insured by reason of such sickness is wholly, necessarily and continuously disabled and prevented from performing every duty pertaining to his occupation and is necessarily, strictly and continuously confined within the house and therein regularly visited and attended by a legally qualified physician or surgeon other than himself.

"Non-House Confinement.

"3 Months Income.

"(b)—The Sickness Monthly Indemnity—will be paid for the period, not exceeding three months, which commences while this Policy is in force, throughout which the Insured, although not confined within the house, is by reason of such sickness wholly, necessarily and continuously disabled and prevented from performing every duty pertaining to his occupation and is necessarily under the regular care and attendance of a legally qualified physician or surgeon other than himself."

The trial court made the following findings of fact, among others (Tr. 66-67):

"11. Defendant, Pacific Mutual Life Insurance Company, paid to Plaintiff indemnity at the rate of Two Hundred ($200.00) Dollars a month, to and including July 21, 1947. The house confinement having ended on May 7, 1947, payments made by the defendant to and including May 7, 1947 discharged the defendant's liability for house confinement indemnity under Part I, subsection (a) of the sickness benefit provision

of the policy, and payments made thereafter from May 8, 1947 to and including July 21, 1947, discharged the non-house confinement, three months' income indemnity under Part K. sub-section (b) of the sickness benefit provisions of the policy to and including July 21, 1947, leaving unpaid the balance of the three-month period from and including July 22, 1947 to and including August 7, 1947. Therefore, there is due the plaintiff from the defendant the unpaid benefits for seventeen (17) days amounting to the sum of One Hundred Nine and 68/100 ($109.68) Dollars, together with interest thereon at the rate of five per cent (5%) from August 8, 1947.

"12. The Plaintiff is permanently physically disabled in that both of his legs are paralyzed; he cannot move about or out of his house without the help of others or without artificial aids, and would be confined to his home if such assistance were not available.

"13. The plaintiff was at all times between Sept. 14, 1946 and Aug. 7, 1947, wholly, necessarily and continuously disabled and prevented from performing every duty pertaining to his occupation, but plaintiff was not regularly visited and attended by a legally qualified physician or surgeon at his house beginning May 8, 1947."

The issues are presented as to whether or not appellant is house confined within the language of the policy when only by artificial aids such as braces, crutches and a wheel chair, petitioner can get out of the house.

The trial court and the court of appeals failed to follow the test of "House Confinement" stated by the Wisconsin cases and failed to give the policy the liberal construction in favor of the insured, contrary to the Wisconsin cases.

The Court of Appeals affirmed the judgment of the District Court, denying recovery and a motion for re-hearing was denied November 28, 1951.

There has been no improvement in the damaged area in MacFarlane's body from the time he was stricken to the date of trial, and the disability which exists is permanent. (Tr. 57-60.)

BASIS ON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION.

This Court's jurisdiction is invoked under 28 U. S. C. A. Sec. 1254.

THE OPINION BELOW.

The opinion below was handed down November 9, 1951, is printed in full in the record (Tr. 74-79) and is reported in 192 Fed. (2) 193.

QUESTIONS PRESENTED.

Is a Federal Court, sitting in Wisconsin, on a case where jurisdiction is derived from a diversity of citizenship and which case involves the meaning of a "house confinement clause" in the policy, bound by the test set up by the Wisconsin Court for determining the meaning of the phrase "House Confinement"?

In constructing an insurance policy where the language may be clearly susceptible to different meanings, when the specific language is applied to the facts involved, therein, should not the policy be construed to favor the insured, pursuant to the Wisconsin cases?

Is the Court of Appeals bound by the findings of the trial court, that after May 8, insured was not attended at his home regularly by a physician, where the undisputed evidence shows that after said date, insured was treated at his home regularly by a physician?

The foregoing questions were determined against the petitioner.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

1. The Court of Appeals has decided a substantial question of State law contrary to the applicable local decisions in that it failed to apply and to follow the test of house confinement prescribed by the Wisconsin court.

2. The Court of Appeals in failing to construe said policy in favor of the insured decided the question of construction of said policy contrary to the Wisconsin cases.

PRAYER FOR CERTIORARI.

WHEREFORE, petitioner, for the reasons outlined above as amplified by the brief in support of this petition which follows, prays that this Court grant its writ of certiorari to review the proceedings below.

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Petitioner,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

FOREWORD.

There are two points which petitioner makes and argues in his brief for a petition for writ of certiorari.

1. The lower courts erred in failing to follow the tests which determine house confinement as established by the Wisconsin cases, and which cases the court must follow under the doctrine of *Erie Railroad* v. *Tompkins,* 304 U. S. 64.

2. Under the doctrine of *Erie Railroad* v. *Tompkins,* this court must find the "house confinement clause" ambiguous when applied to the facts involved therein, *i. e.* capable of two or more meanings and therefore the court must follow the rule in Wisconsin to construe the policy in favor of the insured, and in failing so to do the lower court erred.

I.

The Test of House Confinement Under Wisconsin Cases, Buske v. Federal Casualty Company, 200 Wisconsin, 18, Is the Physical Ability to Walk About Outside.

There is no Wisconsin case holding that one who is paralyzed as petitioner is, is not house confined.

Buske v. *Federal Casualty Company,* 200 Wis. 18, involved a similar policy of insurance with very similar language and an insured who had been committed to a State Mental Hospital, under a court order and who was at

liberty to walk about on the grounds of the hospital. The Wisconsin court in denying relief stated,

> "* * * The confinement referred to is plainly confinement induced by the character and degree of sickness, *a physical incapacity to leave the house resulting directly from the sickness.*"

The above language is but an affirmation of the thought expressed by the trial judge in the findings and decision in the above case, "*the physical incapacity to walk about outside distinguishes a confining from a non-confining illness.*" (Emphasis supplied.)

> Volume 1702, Wisconsin Cases and Briefs, Case No. 7, *Buske* v. *Federal Casualty Company,* 200 Wis. 18.

The word "physical" means body or bodily, according to the dictionary. The word "ability" means power. It would thus appear that the tests expressed by the Wisconsin Court to determine whether one is house confined or not, would be the power of the body to walk about outside, or *the power of the body unaided by artificial aids or outside help to get outside the house.*

The same thought is expressed in the earlier Wisconsin case, *Reeves* v. *Midland Casualty Company,* 170 Wis. 370, at page 374, where the Supreme Court of Wisconsin said,

> "The indemnity provisions of the policy recognized two degrees of illness: (1) When the insured is so ill that he is confined within his house and is therein treated by his physician; the other, *when he is so far recovered that he is able to be outside the house.* * * *" (Emphasis supplied.)

The word "able" of course, means power or ability and the word "recover" has been defined to mean regain, or regain that which one has lost, such as one's health. The undisputed testimony shows that MacFarlane has not re-

covered. The damaged areas of his body are still affected in the same way and as to the same extent as when he was admittedly "house confined". (Tr. 58-60.)

Likewise did the Wisconsin Supreme Court intimate in its decision in the *Buske Case*, 200 Wis. 18, p. 21, that it is the spirit of the language that should control, wherein, in discussing the house confinement clause, it stated,

> "Neither is her situation comparable to a tuberculosis patient, who though confined in bed lives in the open air. Such a situation presents a case of complete physical disability and might very well be held to respond to the spirit of the requirements set up by the policy for full indemnity."

The trial court found that MacFarlane was permanently physically disabled, and that both his legs were paralyzed, "he cannot move about or be outside his home without the help of others or without artificial aids." (Tr. 66.)

The use of artificial aids to overcome disability, under the law of Wisconsin, does not overcome the legal effects of disability as a matter of law to bar recovery. Thus in *MacDonald* v. *Industrial Commission*, 165 Wis. 372, applicant had been injured and partial paralysis followed, but applicant could walk to some extent by using a cane, but could not follow his work as a carpenter, and an award of total disability was upheld, the Supreme Court of Wisconsin holding that for all practical purposes he had lost the use of his legs at the hips. Nor are a man's braces, crutches, or wooden legs a part of his person, but are separate personal property. *London Guaranty and Accident Company* v. *Industrial Commission*, 249 Pac. 642.

It thus appears that the lower courts failed to follow the test prescribed by the Wisconsin Court for determination of house confinement, and that the lower court has decided a substantial question of state law, contrary to the applicable local decisions. See *Stoner* v. *N. Y. Life Ins. Co.*, 311 U. S. 464, 469, 61 S. Ct. 336.

II.

The Lower Court Erroneously Failed to Follow the Wisconsin Decisions Which Would Hold the House Confinement Clause Ambiguous as Applied to the Facts Here, and the Lower Court Declined to Give the Policy a Liberal Construction in Favor of the Insured as Required by the Wisconsin Cases.

The Court, in its opinion, at page 5, in the instant case, determined that the language of the *Reeves* case construing a similar policy bars a liberal construction of the policy involved here. However, it appears in the *Reeves* case that the Supreme Court of Wisconsin *specifically rejected the liberal construction on the grounds that construction cannot be resorted to unless ambiguity exists.* *Reeves* v. *Midland Casualty Company*, 170 Wis. 370, 373.

There, the language in the policy was clear, and there was no ambiguity in applying the language of the policy to the facts before the court. In so doing, the Wisconsin Court was correct. However in the case at bar, while the language of the policy itself may not be ambiguous, *it becomes so when applied to the facts before it.* In the case at bar, we have a plaintiff who was found to be permanently and totally disabled in that he has no power or locomotion. Is he house confined? What is meant by house confinement?

The Wisconsin court held in *Kleuter* v. *Schlitz Brewing Company*, 143 Wis. 347, that *ambiguity in a written contract, calling for construction, may arise from words, plain in themselves,* but *uncertain when applied to the subject matter, as well as from words which are uncertain in their literal sense.* The Wisconsin Court has held that the same rule of construction is to be applied to policies of insurance as to other contracts, *i. e.* to ascertain the intended meaning and understanding of the parties and carry out the

contract accordingly. *Prieger* v. *Exchange Mutual Insurance Co.*, 6 Wis. 89, *Sawyer* v. *Dodge County Insurance Co.*, 37 Wis. 503.

In *Clappenback* v. *New York Life Insurance Co.*, 136 Wis. 626, it was held that an apparently unambiguous contract may be rendered ambiguous and open to construction if its words, taken literally, lead to absurdity or illegality, when applied to the facts.

In *Wheelwright* v. *Pure Milk Association*, 208 Wis. 40, it is held that the language of a contract is ambiguous when the language may reasonably be taken in more than one sense.

It thus becomes very apparent from the foregoing that more than one meaning can properly be attributable to the provisions of the policy here, hinging upon the meaning of the provisions for house confinement.

It is a well settled rule in Wisconsin that when a provision of an insurance policy clause, written by the insurer, is ambiguous, capable of more than one meaning, it will be construed most favorably to the insured.

The Wisconsin Supreme Court, in *Wright* v. *Wrights-Town-Morrison F. Mutual Insurance Company*, 222 Wis. 462, at 466 said:

> "If an insurance company, in writing its policy, fails so to write a provision as to indicate with reasonable certainty what it means by it, it has no just cause for complaint that the provision is given a reasonable construction contrary to its contention, although its contention may also have reason to support it. The court will not in such case do any fine or precise balancing of reasons or splitting of hairs to uphold its contention."

In *Vinograd* v. *Traveler's Protective Association*, 217 Wis. 316, the Supreme Court of Wisconsin, in distinguish-

ing the construction placed by the court on a similar policy of insurance, stated:

> "The decision of the trial court was influenced by the opinion of this court in *Shevlin* v. *American Mutual Accident Association,* 94 Wis. 180. It is true that language used in the opinion of that case, if applicable to the instant case, warrants the decision made. *But, the language of an opinion must be considered in connection with the particular facts involved. Applying language pertinent to one set of facts to a different set of facts is seldom warranted.* Two facts of the *Shevlin Case* were widely different from those here involved * * *. In the *Shevlin Case* it was held the language in a policy involved in the *Vinograd Case* was held open for construction, and the court continued, 'The field for construction being open, it is a familiar rule that in insurance contracts, the construction most favorable to the insured will be adopted. *Bakolars* v. *Continental Casualty Company,* 141 Wis. 43.' " (Italics supplied.)

In *French* v. *Fidelity & Casualty Co.,* 135 Wis. 259, at page 265, the Wisconsin Court stated that any provision or exception that is uncertain or ambiguous in its meaning, or is capable of two interpretations, should receive the construction most favorable to the insured.

> See also *Charette* v. *Prudential Ins. Co.,* 202 Wis. 470.

As was pointed out in the *Vinograd Case,* the language of an opinion must be considered in connection with the particular set of facts involved. "Applying language pertiment to one set of facts to a different set of facts is seldom warranted." As the Court has stated at page 6 of its opinion in the case at bar, the facts of the *Buske Case* and the *Reeves Case* are different from those of the instant case.

Facts distinguishing the *MacFarlane Case* from the *Reeves Case:*

1. **There is permanent disability in the *MacFarlane Case,* and there is no permanent disability in the *Reeves Case.***

2. **There is no physical ability in the *MacFarlane Case* to move about unaided. There was ability to move about unaided and to get outside the house present in the *Reeves Case.***

3. **The policy in the instant case provides "lifetime income—house confinement". There was no such provision as near as we can find in the Reeves policy.**

4. **There was no improvement in the stricken areas in the *MacFarlane Case.* Such improvement was present in the *Reeves Case.***

5. **"Strict compliance on the part of the insured or beneficiary with all the provisions of this contract shall be precedent to recovery hereunder, and any failure in this respect shall forfeit to the company all right of any indemnity." This is a part of the policy involved in the *Reeves Case,* for which there is no corresponding part involved in the case at bar.**

As we have also pointed out in the *Reeves Case,* the language of the policy there was held by the Supreme Court not to be open to construction because there was no ambiguity. In the case at bar, *application of similar language to a different set of facts involves an ambiguity as the words of the policy become susceptible to two different meanings, when applied to the precise facts.*

For such reasons, as above set forth, it becomes apparent that construction is necessary. The rule in Wisconsin is that where ambiguity exists, the policy must be construed, and the *policy will be construed somewhat strictly against the insurer and most favorably to the insured. Christensen* v. *Schenkenberg,* 200 Wis. 581. *Andrews* v. *United States Casualty Company,* 154 Wis. 82, p. 85, *Vinograd* v. *Travel-*

er's Protective Association, 217 Wis. 316, *Garnsky* v. *Metropolitan Life Insurance Company,* 232 Wis. 474, 481.

And in *Rood* v. *Merchants Insurance Company,* 240 Wis. 329, the Wisconsin Supreme Court said with reference to an insurance clause:

> "That this particular clause is open to the interpretation we have indicated seems manifest. Here exists a plain patent ambiguity and it is not contended that the other demolition clauses impose any less liability than this one. By the coverage clause of the body of the policy all increased costs due to demolition caused by necessary conformance to building regulations imposed by ordinance are excluded. * * * To give it any less effect would be to trick the assured into thinking he gets something he does not get and into paying a premium for something he does not get. The insurance companies write these riders. Provisions in riders to insurance policies are to be construed in favor of the assured if they are ambiguous. *Lewis* v. *Insurance Co. of North America,* 203 Wis. 324, 326, 234 N. W. 499. And ambiguities may be latent as well as patent. Latent ambiguities arise when the circumstances under which the instrument was made show an intent or purpose inconsistent with strict language of the instrument itself. They arise when the object of the provision claimed to be ambiguous or the subject matter to which it relates shows what the real meaning of the parties was. Many cases holding to the general effect are cited in 3 Words and Phrases (perm. ed.), pp. 312, 313, and 24 Words and Phrases (perm. ed.), pp. 301 to 304. In such cases the circumstances may be considered for their bearing on construction. The purpose being plain the language used will be construed not to defeat but to accomplish that purpose. The rule is applicable to insurance contracts as well as others. *Hammond* v. *Capital City Mut. F. Ins. Co.,* 151 Wis. 62, 138 N. W. 92, which has been followed in numerous subsequent cases cited in Shepard's Citations, one as late as *Koepke* v. *Sass,* 239 Wis. 291, 1 N. W. (2d) 145."

In *Patterson* v. *National Premium Mutual Life Insurance Co.*, 100 Wis. 118, it was held that in case of doubt or ambiguity, the language of an insurance policy should be construed most strongly against the insurer. See also *Kelly* v. *Fidelity Mutual Life Insurance Company*, 169 Wis. 274, *where language in a policy, clear in itself, becomes ambiguous when applied to the facts before the court.* So, in the case at bar, the language of the policy should be construed most strongly against the insurance company, contrary to the quoted portion of the *Reeves Case* in the opinion of the Court of Appeals at page 5.

It must also be borne in mind that the policy in the instant case bears additional language at the commencement of the policy. "This policy provides indemnity for loss of time on account of disability and other specified losses, caused by bodily injuries effectuated through accidental means and sickness as herein provided" (Tr. 3) and then in the provisions setting up the sickness benefits with reference to Part I, A. sets up *"house Confinement-Lifetime Income."* (Tr. 4.)

It is also to be noted, however, that during the entire period of time that MacFarlane was at the hospital, and later taken to his home, and up until May, 1947, the insurance company paid its contracted payments of $200.00 a month. By so doing the defendant has construed the policy as not requiring the limitations set up in the *Reeves Case.* MacFarlane was not confined to the house within the language of the *Reeves Case,* as interpreted by the Respondent, when he was carried out in an ambulance and transported to Mercy Hospital. Nor was Mercy Hospital his home, within the language of the *Reeves Case.* Then, if a treatment at the physician's office is excluded by the language of the *Reeves Case,* certainly treatment at the hospital should equally be excluded, as not being plaintiff's home. Thus it would *appear that the insurance company has con-*

strued the policy as not requiring the limitations set up in the Reeves Case, but has treated his disability and the house confinement features of the policy as the lack of power or ability to remove himself out of the four walls of the house. As the record shows, MacFarlane's condition when he was at Mercy Hospital was no different than it was on the day of trial. (Tr. 59.)

There is a rule of construction under the Wisconsin cases that parties may be bound by the construction they have placed on their contracts, or their policies. Thus, in *Carlson* v. *Scandia Life Insurance Co.*, 170 Wis. 342, it was said that where two constructions are possible, *the construction given the policy by the company itself must be considered as very persuasive.*

So, in the case at bar, MacFarlane's condition on the day of trial had not improved any. While in Mercy Hospital, under the language of the *Reeves Case,* he was not house confined, having been taken out of the four walls of the house. *He did not go to Mercy Hospital under his own power, but by means of artificial aids. Neither can MacFarlane get out of the house now, except by artificial aids,* as the Court found.

Nor is plaintiff bound to use the artificial aids. His contract does not so provide. See *Nomey* v. *Pacific Mutual Life Insurance Co.*, 33 So. (2d) 531, and *Miller* v. *Mutual Life Ins. Co. of New York,* 289 N. W. 399, 126 A. L. R. 129.

It is respectfully submitted that in as much as the Court of Appeals determined that the *Reeves Case* bars a liberal interpretation of the policy, and it now being shown that this was not given a liberal construction because of no ambiguity, and it *now appearing that an ambiguity exists in the application of similar language,* but somewhat different language, *to different facts,* and that the Wisconsin Court has taken the position in the *Vinograd Case and*

others that applying language pertinent to one set of facts to a different set of facts is seldom warranted, that a liberal construction here is clearly required.

Kelly v. *Fidelity Mutual Life Ins. Co.*, 169 Wis. 274.

Furthermore, the insurance company is bound by its own construction of the policy as treating MacFarlane as house confined, when his condition is identical with that of the day he was stricken, and then carried out of the four walls of his house. It is also true that it is a familiar rule of law expressed in the Wisconsin cases, that when the existence of a state of things is once established, by proof, the law presumes that the personal relationship or state of things continues to exist as before. *State ex rel. Coffey* v. *Chittenden*, 112 Wis. 569.

In the case at bar, MacFarlane was admittedly house confined. His physical condition and ability have not changed. It is presumed that he is still house confined within the meaning of the Wisconsin cases, "until he has so far recovered that he is able to be outside the house". *Reeves* v. *Midland Casualty Co.*, 170 Wis. 370, 374. Plaintiff has not "recovered". The damaged areas are still affected in the same way and as to the same extent as when he was admittedly house confined. The non-house confinement features of the policy do not come into play until there is some recovery. Here there is none.

III.

The Finding That Plaintiff Was Not Regularly Attended by a Physician at His Home After May 8, 1947, Is Not Sustained by Evidence of Any Nature Whatsoever.

The finding so made that plaintiff was not regularly attended by a physician at his home after May 8, 1947 is contrary to the undisputed evidence, and such finding is clearly erroneous. The record shows that MacFarlane was treated both at his home and at his physician's office after May 8, 1947. (Tr. 38, 39, 49 and 57.) MacFarlane testified to these facts on direct examination and on cross-examination, likewise did his physician, Dr. Farnsworth testify that MacFarlane was treated both at the home of MacFarlane and at the Doctor's office. Treatment at the office cannot nullify the positive facts of treatment at the house, undisputed positive evidence of treatment at the house. In this respect, the findings of the trial court are clearly erroneous.

Likewise, if our position as to the liberal construction of the policy is correct, as expressed above, the finding of the trial court is premised on an erroneous application of the Wisconsin law by the trial judge.

It is submitted that under rule 52-A, the foregoing finding is not sustained by the evidence.

In *Gipps Brewing Company* v. *Central Manufacturers Mutual Insurance Company,* 147 Fed. (2d) 6, 14, a finding that the insured complied with all the conditions precedent to instituting suit on the fire insurance policy was not sustained by the evidence.

Furthermore the doctrine is that where the disability is permanent and further care will not improve the damaged areas, failure to be visited by a physician does not bar recovery. (115 A. L. R. 1062, 1066, 1067, 1069.)

CONCLUSION.

For the reasons outlined above in this brief, in support of the petition for writ of certiorari herein, we respectfully submit that the writ should be issued by this court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1951

No. 603

DONALD J. MacFARLANE,

Petitioner,

vs.

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

RESPONDENT'S BRIEF.

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Supreme Court of the United States

OCTOBER TERM, 1951.

No. .....

DONALD J. MACFARLANE,
Petitioner,

vs.

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENT'S BRIEF.

PROCEEDINGS IN THE COURTS BELOW.

The petitioner for the Writ of Certiorari, Donald J. MacFarlane (Tr. 1-6), brought an action to recover benefits under the provisions of an accident and health insurance policy issued by the respondent, Pacific Mutual Life Insurance Company, in the Circuit Court for Rock County, State of Wisconsin (Tr. 1). The action was removed from the Circuit Court of Rock County to the District Court for the Western District of Wisconsin, because of diversity of citizenship, on December 14, 1948 (Tr. 1).

called for his children at school and took them home; drove to the bank at Janesville to make deposits by having someone deposit the money in the bank after he arrived at the bank (Tr. 20). Also, during the month of June, 1947, and thereafter, he made trips to Janesville to call on his physician. These trips he made either alone or, at times, accompanied by one of his children. Arriving at the doctor's office, he would park his car between the sidewalk and the rear of the building in which the doctor had his office, and either attracted the doctor's attention by blowing the horn when alone, or when accompanied by one of his own children he would send the child in to tell the doctor of his presence (Tr. 20). During the month of July, 1947, he made trips to Janesville on a number of occasions, either for pleasure or for pleasure and business, or for the accommodation of his family (Tr. 20). Since June 6, 1947, when he obtained his Oldsmobile, he used this automobile as much as three or four times a day for the purpose of driving his children, on pleasure trips, and also using it for business trips (Tr. 22).

On a sickness form executed by the petitioner under date of June 7, 1947, and by his doctor, Joseph F. Kelly, in May of 1947, the respondent was notified, in writing, by petitioner that he first left the house for any reason whatsoever on May 8, 1947 (Tr. 15), and the respondent was notified by Dr. Kelly, in writing, that the petitioner was necessarily continuously confined inside the house from September 14, 1946, to May 8, 1947 (Tr. 16). The same information was given on a sickness form executed by the petitioner under date of August 6, 1947 (Tr. 16), and by his doctor under date of August 4, 1947 (Tr. 17).

In addition to the activities engaged in by the petitioner from and after May 8, 1947, as stated heretofore, the petitioner made numerous and extended trips from his home

to cities in Wisconsin, Minnesota, Illinois, Ohio, Pennsylvania, New York, and Florida, either by automobile, train, or airplane, which trips were for either pleasure, pleasure and business, attending conventions or visiting with relatives and friends, and for medical treatment and rehabilitation (Tr. 20-47). Petitioner attends church regularly (Tr. 48). Petitioner is able to get out of his house only when he has braces on his legs (Tr. 44) and by either the use of crutches (Tr. 44) or "Sister Kenny sticks" (Tr. 44-45) or his wheelchair (Tr. 44).

The Trial Court took notice of the necessity of Petitioner's use of braces and wheelchair, stating (Tr. 44):

> "I know he is wearing braces. I know he is in here now on a wheelchair. I know he couldn't walk without those braces."

At the trial, it was stipulated that the petitioner was at that time necessarily and continuously disabled and prevented from performing every duty pertaining to his occupation (Tr. 18) within the meaning of the disability clause in the policy.

SUMMARY OF ARGUMENT.

The Court of Appeals decided a substantial question of state law in accordance with the test laid down by the local decisions of the Supreme Court of the State of Wisconsin in holding that the petitioner, although he had a permanent and total physical disability to his legs, and was able and had, on innumerous occasions, left his house using braces on his legs and using either crutches, "Sister Kenny sticks", or a wheel chair, and was NOT house confined" within the meaning of the "house confinement" provisions in the policy issued by the respondent 7

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ARGUMENT.

The Court of Appeals decided a substantial question of state law in accordance with the test laid down by the local decisions of the Supreme Court of the State of Wisconsin in holding that the petitioner, although he had a permanent and total physical disability to his legs, and was able to and had, on innumerable occasions, left his house using braces on his legs and using either crutches, "Sister Kenny sticks", or a wheel chair, was not "house confined" within the meaning of the "house confinement" provisions in the policy issued by the respondent.

The policy provisions pertinent in this case provide for $200.00 monthly sickness benefits (Tr. 3, 61) during house confinement (Tr. 4, 62), providing the following three conditions concur during the period throughout which the insured is by reason of sickness (quoting from the policy) (Tr. 62):

1. " * * * wholly, necessarily and continuously disabled and prevented from performing every duty pertaining to his occupation."
2. " * * * is necessarily, strictly and continuously confined *within* the house." (Italics supplied.)
3. " * * * and *therein* regularly visited and attended by a legally qualified physician or surgeon other than himself." (Italics supplied.)

The monthly indemnity is payable for a lifetime if the insured should be house confined for life under the three concurring conditions set forth above.

However, if house confinement ends, then the same monthly indemnity of $200.00 is payable for a period of

non-house confinement not exceeding three (3) months (Tr. 62), providing the following two conditions concur when the insured is by reason sickness (quoting from the policy) (Tr. 62):

> 1. "* * * wholly, necessarily, and continuously disabled and prevented from performing every duty pertaining to his occupation."
>
> 2. "* * * is necessarily under the regular care and attendance of a legally qualified physician or surgeon other than himself." (Tr. 62.)

In *Reeves* v. *Midland Casualty Co.*, 170 Wis. 370, 371, the policy issued to *Reeves* provided for full indemnity

> "* * * for the period during which the insured shall be necessarily and continuously confined *within* the house and *therein* regularly and personally visited by a legally qualified physician, and wholly and continuously disabled and prevented from performing any and every duty pertaining to any business or occupation solely by reason of such illness." (Italics supplied.)

The policy also provided for one-half (½) the full indemnity

> "* * * for the period not exceeding two consecutive months immediately following said confinement, or by reason of non-confining illness, during which the insured shall be regularly and personally attended by such physician, and wholly and continuously disabled and prevented from performing any and every duty pertaining to any business or occupation."

In *Buske* v. *Federal Casualty Co.*, 200 Wis. 18, the policy issued to Buske provided for full indemnity

> "* * * for the period during which the insured shall be necessarily and continuously confined *within* the house and *therein* regularly and personally visited by a legally qualified physician, and wholly and continu-

ously disabled and prevented from performing any and every duty pertaining to his business or occupation * * *." (Italics supplied.)

The policy also provided for one-half (½) the full indemnity

"* * * for the period not exceeding three consecutive months immediately following said confinement, or by reason of non-confining illness, during which the insured shall be regularly and personally attended by such physician, and wholly and continuously disabled and prevented from performing any and every duty pertaining to his business or occupation * * *."

The "house confinement" provision in the policies in both the *Reeves* and *Buske* cases is, for all practical purposes, identical with the language contained in the policy issued by the respondent to the petitioner. Consequently, the interpretation and construction of the language in the *Reeves* and *Buske* cases by the Supreme Court of Wisconsin controls the interpretation and construction of the language in the respondent's policy here involved.

The question before the Supreme Court of Wisconsin in the *Reeves* case was this:

> Was the insured confined *within* the house and *therein* regularly and personally visited and attended by his physician when the proofs established that Reeves was able to sit on his porch a great deal and frequently drove to the doctor's office, a distance of four miles, to be treated.

The Trial Court, in the *Reeves* case, had instructed the jury as follows (page 373 of the decision):

> "I instruct you that the phrase 'necessarily and continuously confined within the house' means such time as plaintiff was confined within the house, and for such time as plaintiff was disabled by reason of his sickness from departing from his house *for the purpose of attending to the ordinary affairs of life and*

> *to resume the ordinary pleasures thereof,* including the times he may be assisted to the porch of his house to enjoy the benefits of fresh air and sunshine as directed by his physician."

It should be noted that in that case there was evidence that Reeves was *assisted* to the porch of his house to enjoy the benefits of fresh air and sunshine, as directed by his physician. The Supreme Court of Wisconsin, however, held the instruction erroneous and characterized the interpretation of the policy by the Trial Court as a liberal construction.

In interpreting the "house confinement" provisions of the policy in the *Reeves* case, the Supreme Court of Wisconsin stated at pages 373-374 of the *Reeves* decision:

> "It is a familiar rule that in case of doubt or ambiguity the language of an insurance policy should be construed most strongly against the insurer (*Patterson* v. *Natural Premium M. L. Ins. Co.,* 100 Wis. 118, 75 N. W. 980), but it is also well settled that construction cannot be resorted to unless ambiguity exists. Under the terms of the policy the insured was entitled to full indemnity only for the period during which he was necessarily and continuously confined *within* the house and *therein* regularly and personally visited by a legally qualified physician. It would seem that the company *ex industria* employed language which could leave no doubt as to the period during which the insured should be entitled to full indemnity. He must not only be confined *within* the house but he must be *therein* regularly and personally treated by a physician. Treatment at the physician's office was excluded as plainly and as definitely as it well could be. We speculate in vain for language that would more surely limit the period during which the insured was entitled to full indemnity to that period during which he was confined within the four walls of his house and regularly and personally treated by a physician therein. To our minds the language em-

ployed is not capable of a double meaning. It cannot be reasonably construed to include time around the house, about the house, or when he was making trips to Polar and receiving treatment in the physician's office."

In *Buske* v. *Federal Casualty Co.*, 200 Wis. 18, the Supreme Court of Wisconsin stated at page 20:

> "An exactly similar policy was construed in *Reeves* v. *Midland Casualty Co.*, 170 Wis. 370, 174 N. W. 475, and it was there held that in order to entitle the insured to recover full indemnity, necessary and continuous confinement *within the four walls of the house* was required. It was there pointed out that the policy itself prescribed two degrees of illness, and that full indemnity could be recovered only during the time that the insured was necessarily and continuously confined *within the four walls of the house* and therein regularly attended by a physician. The classification thus attempted is of degrees of sickness, and the confinement therein referred to is, plainly, confinement induced by the character and degree of sickness; a physical incapacity to leave the house resulting directly from the sickness." (Italics supplied.)

The Trial Court, having found (Tr. 67) that the petitioner "was at all times between September 14, 1946, and August 7, 1947,

> "'* * * wholly, necessarily and continuously disabled and prevented from performing every duty pertaining to his occupation'."

determined that the first condition in both the "house confinement" and "non-house confinement" provisions of the policy had been satisfied.

In regard to the second condition of the "house-confinement" policy provision, the Trial Court found (Tr. 64) that the petitioner, after May 8, 1947:

> "* * * was no longer necessarily, strictly and

continuously confined with the house and therein regularly visited and attended by a legally qualified physician or surgeon other than himself." (Tr. 64.)

In regard to the third condition, namely, medical treatment within the house, the Trial Court found (Tr. 67):

"* * * plaintiff was not 'regularly visited and attended by a legally qualified physician or surgeon' at his home beginning May 8, 1947."

As one of the conclusions of fact, the Trial Court further found (Tr. 66) that:

"The house confinement having ended on May 7, 1947, payments made by the defendant to and including May 7, 1947, discharged the defendant's liability for house confinement indemnity under Part I, subsection (a) of the sickness benefit provision of the policy, and payments made thereafter from May 8, 1947, to and including July 21, 1947, discharged the non-house confinement, three months' income indemnity under Part I, subsection (b) of the sickness benefit provisions of the policy to and including July 21, 1947, leaving unpaid the balance of the three-month period from and including July 22, 1947, to and including August 7, 1947."

The above quoted findings of the Trial Court were made in the face of the further finding (Tr. 66-67) that:

"The plaintiff is permanently physically disabled in that both of his legs are paralyzed; he cannot move about or out of his home *without the help of others* or *without artificial aids*, and would be confined to his home if such assistance were not available." (Italics supplied.)

The Court of Appeals, in its decision (Tr. 74-79) did not question the findings of fact of the Trial Court, for the obvious reason that its findings of fact were fully sustained by substantial evidence. The Court of Appeals,

having accepted the findings of the Trial Court as conclusive, stated the issue before it as follows:

"The principal issue is whether plaintiff since May 8, 1947, was 'confined within the house' as that term is used in the policy. In this connection, it should be noted that the Court not only found that plaintiff was and continues to be totally disabled but further that 'he cannot move about or out of his home without the help of others or without artificial aids, and would be confined to his home if such assistance were not available.'

"Plaintiff makes an appealing argument, not entirely without reason and logic, that a liberal construction of the policy, to which he is entitled, requires a holding that he was and is house confined. This argument rests on the premise that plaintiff because of his illness was without the physical ability to leave the house on his own, that is, that he was unable to do so without assistance and without the aids which he employed.

"The District Court having aquired jurisdiction of the case by reason of diversity of citizenship, the law of the State of Wisconsin is controlling. Two decisions of the Supreme Court of that state are relied upon by the defendant as squarely in point. (*Reeves* v. *Midland Casualty Co.*, 170 Wis. 370, and *Buske* v. *Federal Casualty Co.*, 200 Wis. 18.) And while the record does not specifically show, we assume that the District Court in deciding the issues adversely to the plaintiff agreed with the defendant. *After giving these cases careful study, we think there is no escape from such a conclusion.*

"In each of these cases, the Court had before it a health and accident policy and construed a provision almost identical with that here under consideration.

"* * * It is true, of course, that the facts of these cases are different from those of the instant case, and the plaintiff intimates that if the facts of the present case were before the Wisconsin Court, it might reach a different result. *But we are not per-*

mitted to speculate on what the Wisconsin Court might hold in some future case. It has quite definitely construed the provision in question and we see no escape from its binding effect. (Italics supplied.)

"Moreover, the Court found that commencing and after May 8, 1947, plaintiff was not at his house 'regularly visited and attended by a legally qualified physician or surgeon'. This finding, under the holding in the *Reeves* case (heretofore quoted), would present an additional obstacle to plaintiff's right to recover.

"* * * In concluding, we cannot resist the temptation to express our admiration for the remarkable courage and ingenuity displayed by the plaintiff in an attempt at rehabilitation. His rights, however, as well as those of the defendant, must be determined by the contract which the parties made *as it has been construed by the State Court.*" (Italics supplied.)

Thus it appears conclusively that the Court of Appeals did apply the tests laid down by the Supreme Court of the State of Wisconsin in the *Reeves* and *Buske* cases.

Conclusion.

For the reasons stated herein, it is respectfully submitted that the petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1951.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

The house confinement clause in health and accident policies is generally held to be an expression for the necessary state of illness to allow recovery. It is not a clause prescribing a course of conduct for the insured.

Aetna Life Insurance Company v. *Willetts,* 282 Fed. 26.

In view of the varying circumstances under which the question arises as to the meaning of the phrase, "Confined within the house," it is not the general language of an opinion construing such clause that controls, but it is the tests employed by the courts determining whether house confinement exists that is determinative.

The issue in the *Reeves Case,* 170 Wis. 370, was whether one who had been ill with a pleurisy condition had so far recovered or improved so that he was able to get out onto the porch of his house was confined within the house. The Wisconsin court held he was no longer so confined.

The issue in the *Buske Case,* 200 Wis. 18, was whether a mental patient at a mental hospital who had the liberty of the grounds was confined within the house. The Wisconsin Court held she was not so confined and that *the distinguishing feature between a confining and a non-confining illness was the physical incapacity to leave the house resulting directly from the illness.*

In both Wisconsin cases, the insured had the physical ability to leave the house.

In the instant case, the trial court found that *"plaintiff is permanently, physically disabled in that both of his legs are paralyzed, he cannot move about or out of his house without the help of others, or without artificial aids,* and would be confined to his house if such assistance were not available. (Tr. 66-67, Finding number 12.)

Consequently, plaintiff does not have that physical ability or physical capacity to leave the house, as stated in the *Buske Case,* 200 Wis. 18, and should be considered house confined.

It must be borne in mind that there has been no recovery or improvement in petitioner's condition, which distinguishes the instant case from the *Reeves Case.*

Our courts have long recognized that the same words in different settings may well have different meanings. So as Justice Holmes wrote in *Towne* v. *Eisner,* 245 U. S. 418, 425,

"A word is not a crystal, transparent and un-

changed, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

The same type of thought is indicated in *Jones* v. *Holland Furnace Company*, 188 Wis. 394, at page 399, where the Supreme Court of Wisconsin said:

> "In an early leading case, which has often been cited and quoted, but never overruled, the ambiguity or uncertainty related to the word 'team.' In the opinion of Chief Justice Dixon, it was said:
>
> > " 'The word "team", as used in the contract, is of doubtful signification. It may mean horses, mules, or oxen, and two, four, six, or even more of either kind of beasts. We look upon the contract and cannot say what it is. And yet we know very well that the parties had some definite purpose in using the word. The trouble is not that the word is insensible and has no settled meaning, but that it at the same time admits of several interpretations, according to the subject matter in contemplation at the time. It is an uncertainty, arising from the indefinite and equivocal meaning of the word, when an interpretation is attempted without the aid of surrounding circumstances. It appears on the face of the instrument, and is in reality a patent ambiguity. * * *' *Ganson* v. *Madigan*, 15 Wis. 144."

So as to the phrase "confined within the house." It would thus seem that the court of appeals erred in not determining that the phrase "confined within the house" was ambiguous under the Wisconsin cases, as applied to the specific facts involved, and that a liberal construction of the policy ought to have been given as required by the Wisconsin cases.

Suppose under the policy involved here, there is a diabetic who has had amputations of his legs, and perhaps of

his arms, but who can be wheeled out in a wheel chair, or carried outside the four walls of his house in a basket, is he house confined under the test expressed by the *Buske Case?* He certainly has a physical inability to get outside the four walls of the house, yet being carried out of the house, he is no longer within the four walls of the house.

The literal application of the general language of the *Reeves Case* as argued by respondent in the case at bar, would hold that he was not house confined. Yet such person has the same lack of power of locomotion as plaintiff in the instant case.

In *Mutual Health and Accident Association* v. *Bowman,* 99 Fed. (2) 856 (Certiorari Denied, 306 U. S. 637) the Supreme Court on the strength of *Erie Railroad* v. *Tompkins,* had previously granted certiorari and vacated the previous judgment and remanded the case for re-determination "limited to the question of the right to recover under the law of New Mexico."

The provision of the policy relied on by defendant to exempt it from liability was "this policy does not cover death, disability or other loss received because of or while participating in aeronautics. * * *"

Defendant relied upon the decision of the New Mexico Court in *Sneddon* v. *Massachusetts Protective Association,* 39 N. M. 74, 39 Pac. (2) 1023, where recovery was denied when the insured was a casual invited passenger in the plane. The policy in the *Sneddon Case* excluded participation in aviation and aeronautics.

The Eighth Circuit authorizing recovery for the insured stated that under the rule of *stare decisis* the language and general expressions in an opinion should be limited to the particular facts and issues involved, and must be construed in light of the issues presented and considered. They should not be extended beyond that for any purpose

or authority to another or different case. To be binding as a precedent there must have been an application of the judicial mind to the precise question to be determined in order to fix the rights of the parties.

The court then discussed the meaning of the word "aeronautics" and the word "participating," and concluded that the word "participating" is ambiguous as having a double meaning, and that in the cited case there was no issue as to the meaning of that term and affirmed a recovery for the plaintiff.

As we have pointed out in our original brief, in *Vinograd* v. *Travelers Protective Association*, 217 Wis. 316, involving an accident policy, the Wisconsin Court definitely limited the application of the language from one opinion involving one set of facts, and held that a similar policy applied to a different set of facts, properly should have been given a liberal construction, contrary to the previous adjudication.

In *Order of United Commercial Travelers* v. *Sevier*, 121 Fed. (2) 650, a policy provided for payment should death result from bodily injury effected solely from external violent and accidental means and independent of all other causes, but that the association should not be liable for any death by infection whether caused by accidental means or not unless the infection be introduced into the body through an open wound, which open wound must be caused by external violent and accidental means, and be visible to the unaided eye. The insured, in avoiding an accident in his car, struck a concrete drain and overturned. Abdominal pains developed and a ruptured intestine existed. The court in authorizing recovery stated that the contract being one of a Benefit Society, organized under Ohio law, should be construed according to Ohio decisions, and the *courts of Ohio, not having construed the particular provisions*

in question, as applied to the particular facts presented, must exercise its own judgment in the construction of the policy, and the court went on to state at page 654 in the opinion:

> *"A contract may or may not be ambiguous, uncertain or obscure, dependent upon the proven facts."* (Emphasis supplied.)

Here the contract does not require the wound through which the infection entered to be on the exterior of the body. There must be physical evidence of its existence, and there was physical evidence of the existence of the wound visible to the naked eye after surgery had been performed.

The physical ability of locomotion existed in both the *Reeves* and *Buske Cases.* That ability is not present in the instant case. That distinction makes inapplicable the general language of those two cases, construing similar policies and leaves available only the naked test of house confinement, as expressed in the *Buske Case, i. e. "the physical incapacity to leave the house, resulting directly from the sickness."* Consequently it follows that there having been no precise determination of this exact question before the Wisconsin Court, the determination of the *Vinograd Case* declining to apply the language of one opinion to a different set of facts, is particularly appropriate to the instant case. A liberal construction of the policy is clearly authorized under the Wisconsin cases cited in our original brief.

The phrase "confined within the house" is a kind of generic term designed and conceived to measure the extent of disease, affecting the human species, and to furnish a relatively simple measurement or test for determining liability.

Obviously, being designed to be all inclusive as a test,

it is appropriate for many ailments and as to them the language "confined within the house" may well be unambiguous. Thus in cases of heart ailments and pneumonia and many others, when the insured has so far recovered that he is physically able to get outside the house, he no longer can be held to be "house confined". But in that class of ailments, characterized by paralysis of the legs, from which there has been no recovery or improvement, or in those cases where amputation of the legs has become necessary and the insured can get out of the house only by being pushed in a wheel chair, carried or rolled out, it is submitted that the phrase then becomes ambiguous.

Furthermore, it is to be noted that the house confinement phrase is modified by the word "necessarily". "Necessarily" means of necessity. "Necessity" means "unavoidableness" "fate" or "doom" or "inevitableness". It would appear that one who has had his legs amputated or one who is paralyzed in his legs so there is no power of locomotion is inevitably and necessarily house confined. The question of whether one whose legs are paralyzed so that he can only get out of the house only by means of artificial aids has not been specifically passed on by the Wisconsin courts. The great weight of authority, where the question has been determined, allows recovery. Under the circumstances, disclosed in the instant case, it appears that the *Reeves* and *Buske Cases* which rejected a liberal construction of similar policies are not authoritative upon the construction of this policy when it is applied to the circumstances which render the language contained in the policy ambiguous. Consequently, the general language of the *Buske* and *Reeves Cases,* construing similar policies, cannot be authoritative on the precise question involved here but the specific test expressed therein is applicable. *The physical inability to get out of the house distinguishes a confining from a non-confining illness.*

The language of the *Reeves Case* relied on by respondent, and quoted by the Wisconsin Court in the *Buske Case,* page 10 respondent's brief, and referred to in the opinion of the Court of Appeals, is but descriptive of the limits of the house confinement phrase, and shows that the intention of the policy was to limit the insured's movements to the four walls of the house. He is restricted in his normal movements to the four walls of the house. *The body of the insured must have the ability, unaided, to get outside of the house before he becomes no longer house confined.*

In the instant case, the court found that petitioner could not move about or get out of the house without artificial aids. If the test of house confinement under the *Buske Case* is not the physical power of the body of the insured, unaided by artificial aids, or other assistance, to get outside the house, the house confinement clause is meaningless, for one whose legs and arms have been amputated could be carried out of the four walls in a basket and no longer could be house confined. It is submitted that under the *Reeves* and *Buske Cases* an insured is no longer house confined when his ailing body has so far recovered that by his own power, without artificial aids, he is able to get outside the four walls of the house. *The fact that an insured is outside the four walls of his house becomes important only when it is shown how he got there, not the fact alone that he was outside.*

The Court of Appeals in its opinion failed to give proper consideration to this question, the matter of how the insured got outside the house. The language of the *Buske Case* so indicating was not considered, *i. e.,* "the confinement referred to is plainly confinement induced by the character and degree of sickness, *a physical incapacity to leave the house,* resulting directly from the sickness."

Buske v. *Federal Casualty Company,* 200 Wis. 18: "the

physical capacity to walk about outside, distinguishes a non-confining illness from a confining illness", opinion of Trial Court in *Buske* v. *Federal Casualty Co.*, 200 Wis. 18, Vol. 1702, Wisconsin Cases & Briefs Case No. 7. Thus it would appear that where the insured is able to walk out of his house under his own power and without aids, an insured is not "House Confined". But where the insured can only leave his house by means of a wheel chair or other artificial aid because of amputated or paralyzed limbs, it would appear that the insured does not have the physical capacity or bodily power or ability to leave the house as is required under the *Buske Case,* and is therefore "house confined".

The policy further contains language descriptions of the house confinement clause "House Confinement—Lifetime Income". It is submitted that if the instant case is not a case for "Litetime Income" and liability under the policy, under what circumstances could an insured ever recover a lifetime income under such a policy?

Under the *Buske Case,* as interpreted by respondent, and the Wisconsin Court, a mental patient cannot recover, for his confinement is to the grounds and he is physically able to get outside the house. In the case at bar, petitioner is either carried out or wheeled out in his wheel chair, or by artificial aids, braces, crutches, etc., gets outside the house, but without them he is physically unable to move, as the Court found, and he is held not to be house confined. If the policy means anything, and is not a fraud, it should be given a liberal construction as required by the Wisconsin cases. It is submitted that the Court of Appeals erroneously concluded that it was bound by the general language of the *Buske* and *Reeves Cases,* which were premised on a rejection of a liberal construction of a similar policy. Here it is submitted ambiguity exists and a liberal construction is required. Likewise, did the Court of Appeals,

in its opinion, neglect to give consideration to the test which is expressed in the *Buske Case,* for house confinement, *i. e.,* the physical incapacity to leave the house resulting directly from the sickness.

The benefit which *Erie Railroad* v. *Tompkins,* 304 U. S. 64, sought to obtain was the uniformity of decision between state and federal courts.

To require, however, the lower federal court to be blindly bound to follow the local decisions construing similar policies of insurance, and which opinions rejected the liberal construction, clearly required in the instant case because of ambiguity, while at the same time the state court is free to adopt a liberal construction of such a policy, where required, as shown in the *Vinograd* case, is needlessly to hamper the federal courts in the administration of justice and to undo the benefits obtained under the *Erie Railroad* v. *Tompkins* ruling.

It is as much the duty of the federal court under the *Erie Railroad* case to be free to determine an ambiguity and adopt a liberal construction where the state court would so act, as it was for the federal court to follow the applicable local doctrines expressed in *Guaranty Trust Co.* v. *York,* 326 U. S. 99.

It is submitted that the writ should issue.

Respectfully submitted,

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